Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GAME SHOW NETWORK, LLC,	)	
Complainant,	)	MB Docket No. 12-122
	)	File No. CSR-8529-P
v.	)	
	)	
CABLEVISION SYSTEMS CORP.,	)	
Defendant.	)	
	)	
Program Carriage Discrimination	)	

TO: The Commission

GAME SHOW NETWORK, LLC's OPPOSITION TO CABLEVISION'S MOTION FOR ACCEPTANCE OF ITS RESPONSE IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE INITIAL DECISION

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The Commission's rules limiting surrebuttals are fully consonant with the importance the Commission attributes to the expedited resolution of carriage disputes in Section 616 cases. As Cablevision recognizes, those rules plainly disallow Cablevision's proffered pleading.[1] The exception Cablevision seeks is especially inappropriate given that Cablevision already received permission to file an oversize 40-page initial brief.[2]

Cablevision's attempt to justify its proposed submission on the basis of a need to "respond to new arguments raised for the first time" in GSN's Reply is meritless, in any event.[3] Cablevision has not identified a *single* affirmative issue or new set of facts that GSN raised for the first time in its Reply. Instead, the "new arguments" to which Cablevision refers are simply GSN's responses to Cablevision's arguments in its Exceptions—as is demonstrated by the fact that in many cases Cablevision's "new" responses simply repeat (in some instances verbatim) those Exceptions.[4]

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[1] *See* Cablevision Mot. for Acceptance of Response, at 1 (requesting permission to file unauthorized surreply).

The Commission's rules provide for only one set of responsive pleadings—those filed by parties other than the party that filed exceptions. *See* 47 C.F.R. § 1.277(c). If the Commission wished to provide an opportunity for a responsive brief here it could have done so—and, in fact, it has expressly provided for such responses in other contexts. *See, e.g.*, 47 C.F.R. § 1.302(g) (providing, with respect to appeals of *final* rulings, that "Oppositions and replies shall be filed and served in the same manner as the appeal.").

[2] *See Game Show Network, LLC v. Cablevision Systems Corp.*, Order, MB Docket No. 12-122, File No. CSR-8529-P, DA 16-1393 (Dec. 15, 2016) (granting page-limit extension); *see also* 47 C.F.R. § 1.48(b) ("It is the policy of the Commission that requests for permission to file pleadings in excess of the length prescribed . . . shall not be routinely granted.").

[3] Cablevision Mot. for Acceptance of Response, at 1.

[4] Cablevision's repeated demand for a further opportunity to supplement the record is also questionable given that it is *Cablevision* that has itself been tardy to complete the record in this case. It waited until its Exceptions to call to the Commission's attention that Altice has acquired Cablevision's distribution business—a transaction first announced in September 2015, prior to closing arguments in this case—and to argue (without merit) that the changed ownership affects its contentions regarding the First Amendment and the propriety of the ALJ's relief. *See* GSN Reply to Exceptions, at 38 n.194 (noting announcement of Altice transaction). That

Cablevision's proposed new brief does not address the ALJ's fundamental conclusions: (1) Cablevision treated GSN in ways it would never have considered appropriate in its dealings with its own affiliated networks; (2) that it did so to protect its affiliates; and (3) that GSN has been materially harmed in its ability to compete as a result. In sum, Cablevision's proposed Response adds nothing to this record; its motion to file it should be denied.

I. CABLEVISION IS NOT PERMITTED TO FILE A FURTHER RESPONSE.

Cablevision itself has eloquently articulated the need to prevent uncontrolled pleading cycles, criticizing unauthorized submissions in FCC proceedings that "do[ ] not respond to any unique or unexpected arguments" made by an opposing party.[5] As Cablevision has argued, "[t]he Commission's rules and the basic requirements of due process are designed to prohibit just this type of sandbagging, and they require that the [unauthorized submission] be stricken."[6]

Unfortunately, Cablevision has not chosen to follow the dictates of its own insight. While Cablevision does claim its proposed Response replies to new arguments and facts raised by GSN, that assertion is demonstrably false, and the facts here do not justify the have-the-last-word relief Cablevision seeks.[7] Cablevision's proposed brief addresses only GSN's responses to

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development should properly have been raised months earlier so that it could have been addressed by the Commission or the ALJ and disposed of at that time.

[5] *See*, *Verizon Telephone Cos. v. Madison Square Garden, L.P.*, Motion to Strike, at 1, File No. CSR-8185-P (Aug. 31, 2009) (moving to strike unauthorized exhibit to reply brief).

[6] *Id.*, at 2.

[7] The cases Cablevision cites are largely irrelevant to the consideration of exceptions to an initial decision in a Section 616 case. *See* Cablevision Mot. for Response, at 2 n.2 (citing *In re Comcast of Potomac, LLC*, 24 FCC Rcd. 8919, 8921 (MB 2009) (Media Bureau considering surreply to effective competition petition); *In re World Satellite Network, Inc. v. Tele-Commcn's, Inc.*, 14 FCC Rcd. 13242, 13242 n.11 (CSB 1999) (Cable Services Bureau considering surreply only where responding party violated rule not applicable here that "expressly prohibits the complainant in a program access proceeding from raising new issues in its reply"); *In re Time Warner Cable Inc*., 31 FCC Rcd. 5457, 5458 n.7 (MB 2016) (Media Bureau considered additional pleadings filed by *both* parties where it found "no prejudice to the parties" would result); *In re Radio Perry, Inc. (Wpga-TV, Perry, Georgia) v. Cox Commcn's, Inc.*, 26 FCC Rcd. 16392, 16392 n.6 (MB 2011) (Media Bureau decision accepting surreply that would "normally

Cablevision's Exceptions; it does not identify along the way any new issue, argument, or set of facts raised for the first time by GSN. There is, in other words, nothing in GSN's Reply that should have come as a surprise to Cablevision or that it could not have anticipated, and thus nothing that could justify a surrebuttal.

II. THE PROPOSED RESPONSE USES GSN'S REPLY AS PRETEXT TO REPEAT CABLEVISION'S PRIOR ARGUMENTS.

Cablevision's proposed brief betrays Cablevision's true purpose: to rehash the same arguments it has made time and again. Indeed, under the guise of need it even quotes the same language it used in prior pleadings. Of the 38 footnotes in the proposed Response, thirteen refer back directly to Cablevision's Exceptions brief.[8] For example, Cablevision opens its proposed Response by arguing its view as to the appropriate standard of review of an ALJ decision. Yet nothing has changed: that is the identical issue that Cablevision addressed in an identical way in the very first argument paragraph of its Exceptions and that was fully addressed by both parties.[9] Elsewhere, Cablevision uses the excuse of "new" issues or arguments raised by GSN to restate its Exceptions—sometimes relying on the exact same language from Commission decisions it had cited previously.[10]

An examination of a few of Cablevision's responses to purportedly "new" issues—for example, those relating to the ALJ's findings of direct evidence of discrimination, the standard of review for circumstantial evidence under the *Tennis Channel* decision, and the impact of the

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not be permitted under the Commission's rules" because, *inter alia*, "[t]he Motion was unopposed").

[8] *See* Cablevision Proposed Br., at nn. 1, 3, 4, 5, 7, 9, 12, 13, 21, 22, 26, 30, 38.

[9] *Compare* Cablevision Exceptions, at 5 *with* Cablevision Proposed Br., at 1 (both citing 5 U.S.C. § 556(d) to present same argument on standard of review).

[10] *See, e.g.,* Cablevision Proposed Br., at 2 n.5 (repeating argument regarding Cablevision executive Bickham), 2 n.7 (repeating quoted testimony from Exceptions brief), 2 n.9 (repeating argument regarding direct evidence), 3 n.11 (citing same language from the *WealthTV* decision as cited on page 8, note 31 of Exceptions brief), 3 n.12 (citing identical argument in Exceptions brief), 3-4 n.13 (referring to circumstantial evidence argument).

First Amendment—reveals that GSN in fact raised no arguments or facts in its Reply that would warrant an opportunity for a further response.

A. The Reply Raised Nothing New On Direct Evidence of Discrimination.

Cablevision claims that GSN raised new material addressed to whether the record revealed direct evidence of Cablevision's discrimination. But GSN merely responded to Cablevision's arguments in its Exceptions that there was no direct evidence of discrimination.[11]

Nothing is to be gained by repeating the arguments previously made. But it is worth noting that in its Reply GSN pointed to the uncontested evidence cited in the Initial Decision—which Cablevision omits even from its proposed Response—that Cablevision's distribution arm consistently [redacted] in its contracts with its affiliates, a break that Cablevision admittedly *never* offered to non-affiliates and that cost its distribution business [redacted].[12] This evidence—like evidence in a gender discrimination case that an employer paid huge discretionary bonuses only to men, and then considered only women for budget-related reductions in force—constituted direct evidence of discrimination within the meaning of the law.

Likewise, GSN pointed to testimony by Cablevision's executives that they couldn't "walk away" from carriage negotiations with affiliated networks—that they had to strike a deal

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[11] *See generally* Cablevision Exceptions, at 5-14.

Cablevision's proposed Response also renews the incorrect argument it first made in its Exceptions that even direct evidence of discrimination is unavailing if an MVPD does not have affiliated networks that are similarly situated to the complainant—a proposition the ALJ rejected as "absolutely wrong" under the law. *See* Initial Decision, at ¶ 114 ("Sections 616 of the Act and 76.1301(c) of the Commission's rules prohibit Cablevision from discriminating in video programming distribution on the basis of affiliation or non-affiliation . . . , period.").

[12] GSN Reply to Exceptions, at 4 n.26 (citing *Game Show Network, LLC v. Cablevision Sys. Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippell, FCC 16D-1, at ¶ 108 n.496 (ALJ Nov. 23, 2016) [hereinafter, "Initial Decision"] (testimony that Cablevision [redacted])), 12 n.62, 14 n.73, 16 n.81.

acceptable to those networks—to refute Cablevision's assertion that it dealt with its affiliates at arm's length. That testimony constituted an admission of a policy favoring its affiliates that Cablevision did not extend to non-affiliates like GSN. Thus, Cablevision distribution executives could not have done to the affiliated networks what they did to GSN: refuse meaningfully to negotiate with GSN over a new contract, carry it out of contract for [redacted], and leave GSN without any protection against Cablevision's retiering decision.[13] Cablevision's suggestion that the "the record is devoid of any proof at all" of its discriminatory policies is thus directly contradicted by the ALJ's findings on this subject. And in pointing to that evidence in its Reply, GSN did nothing but respond to Cablevision's argument. There is surely nothing in any of the arguments that could justifiably trigger Cablevision's right to a further pleading.

B. GSN Raised No New Issues Regarding the ALJ's Application of *Tennis Channel*.

Cablevision also claims that GSN raised a "new" argument relating to the impact of the D.C. Circuit's *Tennis Channel* decision.[14] GSN's arguments in its Reply regarding the proper reading and application of a case on which Cablevision chose to rely are far from "new." In fact, both parties submitted extensive pre- and post-hearing briefs and proposed findings that addressed at length the impact of the D.C. Circuit decision.[15]

First, as GSN showed in its Reply—and addressed in prior filings dating back to April 2014—the original *Tennis Channel* decision effected what another D.C. Circuit panel recently

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[13] *See* Initial Decision, at ¶ 24 nn. 107 (quoting Cablevision executive Thomas Montemagno's Testimony "that when Cablevision made the retiering decision in 2010, GSN 'had been out of contract for [redacted].'"); *see also id.*, at ¶ 22 (discussing Cablevision's refusal to meaningfully negotiate a new contract with GSN).

[14] *See* Cablevision Proposed Br., at 6-8. *See also Comcast Cable Commc'ns v. FCC*, 717 F.3d 982 (D.C. Cir. 2013).

[15] *See, e.g.,* GSN Proposed Findings of Fact and Conclusions of Law, at 54-60 [hereinafter "GSN Proposed FoF"] (applying *Tennis Channel* holding to articulate and address three ways GSN can demonstrate Cablevision's discrimination was not based on valid business purpose).

referred to as a "shift[ ]" of the "evidentiary focus" in Section 616 cases involving circumstantial evidence of discrimination.[16] GSN discussed in its Reply the precise same three alternative forms of proof that it addressed in 2014 and again in 2015: (1) the "net benefit" test; (2) the "incremental loss test"; and (3) a showing of pretext.[17] All three of these alternatives under *Tennis Channel* were available to GSN to establish that Cablevision's disparate treatment of GSN was not a legitimate business decision.[18] And all three have been briefed extensively throughout this case.

GSN demonstrated that the ALJ's findings satisfied *all three* evidentiary frames, even though prevailing on any one of them was sufficient to satisfy the D.C. Circuit's test. GSN presented extensive evidence that Cablevision's rationales for retiering GSN—for example, cost-savings of a one quarter of one percent of its programing budget and GSN's performance in a non-standard, non-representative set-top box data analysis—were irrelevant to the actual reason GSN was retiered and were simply pretexts or post-hoc justifications to cover up the real reasons for the retiering.[19] It next demonstrated that any incremental losses to Cablevision from keeping GSN on a broader tier—in the form of increased subscriber fees—were no greater, and in fact less, than the losses to Cablevision from continuing to carry its similarly-situated affiliated

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[16] *See* GSN Reply to Exceptions, at 17-18 (citing *Tennis Channel, Inc. v. FCC*, 827 F.3d 137, 143-44 (D.C. Cir. 2016)). Specifically, the D.C. Circuit panel explained that, "[t]he evidentiary focus of the inquiry had shifted from whether an MVPD offered preferential treatment to its affiliates with similar programming and costs to whether [the unaffiliated network] had shown that the MVPD could have recouped the costs of broadening coverage of the non-affiliate such that failing to do so could not have been a legitimate business decision." 827 F.3d, at 143-44; *see also* April 10, 2014 Joint Status Report, at 3-4 ("[*Tennis Channel*] identified three forms of proof that *could* have supported a finding that Comcast did not have a legitimate business purpose for treating Tennis Channel differently from its competing affiliated services.").

[17] *See* GSN Proposed FoF, at 54 (explaining three evidentiary tests); April 10, 2014 Joint Status Report, at 4-7 (same).

[18] *Comcast Cable*, 717 F.3d, at 987 (providing alternatives).

[19] GSN Proposed FoF, at 54-55. *See also* GSN Reply to Exceptions, at 13-16 (explaining ALJ's use of evidence on budget, Cablevision testimony, and subscriber reactions to retiering as basis for finding pretext).

networks on the broader tier—a showing that met the "incremental loss" test.[20] And the record shows GSN was as popular as—and much less expensive than—some of Cablevision's owned networks, as to which retiering was never considered.[21]

Finally, GSN pointed out that the ALJ made factual findings establishing that GSN met the "net benefit" test. For instance, Cablevision lost money, audience goodwill, and competitive standing by retiering GSN,[22] and the action was inconsistent with an overwhelming national market consensus on GSN's value proposition.[23]

Specifically, this is not a case where Cablevision's treatment of GSN was within "the industry mainstream," a factor deemed of controlling significance by the dissenting

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[20] GSN Proposed FoF, at 56-58; *see also* GSN Reply to Exceptions, at 18 ("[The ALJ] found . . . that Cablevision 'would have saved significantly more by retiering one of its affiliated networks, including WE tv.'" (citing Initial Decision, at ¶¶ 64 n.325, 107 n.490, 112 n.510)).

[21] *See* GSN Reply to Exceptions, at 13-16 (discussing ALJ's findings that Cablevision's justifications for the retiering were pretexts for discrimination because, *inter alia*, "GSN had higher viewership than a number of Cablevision's affiliates" and "GSN was a uniquely popular network that was highly valued by and attracted the loyalty of Cablevision subscribers.").

Notably, the ALJ and the Commission did not order in this case that a complainant programmer be carried at a greater penetration level than any other MVPD had carried that programmer, as was the case in the *Tennis Channel* decision. *See, e.g.*, *Tennis Channel, Inc. v. Comcast Cable Commcn's*, 27 FCC Rcd. 8508, 8551 (2012) [hereinafter, "Pai/McDowell Tennis Dissent"] (McDowell and Pai dissenting because, *inter alia*, Tennis Channel sought carriage from Comcast well above the level of carriage by other major MVPDs). Rather, here Cablevision's decision to move GSN to the low-penetration premium sports tier from its position on the expanded basic tier made *Cablevision* the market outlier compared to the carriage virtually all of its peers afforded GSN, and indeed when compared to its own historic carriage of GSN. *See also* GSN Exh. 303, Hopkins Written Direct, at ¶ 20 ([redacted]).

See Initial Decision, at ¶ 48 (finding Cablevision lost approximately 5,500 subscribers).

[23] *See id.*, at ¶ 80 ("[D]iametrically contrary to Cablevision's assertion that GSN was retiered because it was a weak and unpopular network, the preponderance of evidence proves beyond any equivocation that GSN was a uniquely popular network that was highly valued by and attracted the loyalty of Cablevision subscribers."). *See also* GSN Exh. 297, Goldhill Written Direct, at ¶ 23 ("Every other major distributor recognizes GSN's value — that is, the high ratings it delivers at a relatively low cost compared with other networks — and has continued to carry the network broadly.").

Commissioners in the *Tennis Channel* case.[24] Cablevision admits that it retiered GSN even though, at the time of the retiering, GSN was "a fully penetrated network with approximately 73.5 million subscribers nationwide," and the record shows GSN was as popular as—and much less expensive than—some of Cablevision's owned networks, as to which retiering was never considered.[25] None of this was "new" in this case, and nothing that Cablevision desires now to argue was unavailable to it at the time it prepared its Exceptions.

C. Cablevision Points to No New Argument Justifying a First Amendment Right to Discriminate.

With respect to Cablevision's First Amendment argument as well, GSN's Reply merely responded directly to the Exceptions. There, Cablevision argued that the Commission may order mandatory carriage only where it finds that "a substantial government interest . . . justif[ies] its power to compel speech."[26] Cablevision suggested that its merger with Altice—the effect of which was the divestiture of the Cablevision programming business—necessarily meant that there was no longer a "substantial" government interest in ordering carriage.[27] It also argued that the divestiture assured that since Cablevision was no longer vertically integrated "there is no risk of future wrongdoing."[28] In sum, the change in circumstances "undermined any government

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[24] *See,* Pai/McDowell Tennis Dissent, at 8551 ("In our view, the Commission's analysis founders on this simple fact: Comcast's treatment of Tennis Channel was within the industry mainstream.").
[25] Initial Decision, at ¶ 10 n.35 (citing Cablevision Proposed FoF, at 8).
[26] Cablevision Exceptions, at 38-39. *See also Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996) (explaining Commission may order mandatory carriage where it finds an "important or substantial" government interest, and the "means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim"); GSN Reply to Exceptions at 36-37 (quoting *Time Warner Entm't*, 93 F.3d at 969).
[27] *See* Cablevision Exceptions, at 38-39.
[28] *See id.*, at 39-40.

interest" in enforcing a carriage remedy against the post-merger Cablevision and rendered any attempt to enforce such a remedy "unlawful."[29]

In reply, GSN showed that the change in ownership—an issue tardily raised by Cablevision, not GSN[30]—is legally irrelevant; it did not moot the case or alter the ALJ's right to remediate Cablevision's illegal conduct. Even assuming intermediate scrutiny applies to a carriage remedy imposed on an MVPD that already *voluntarily* carries the complaining network's signal, GSN demonstrated that the standard continued to be met here. Binding precedents have firmly established the importance of the governmental interest in enforcing Section 616.[31] The mere change of control of Cablevision, even with the divestiture of its programming networks, is immaterial. Altice knowingly assumed the consequences (and realized the benefits) of Cablevision's discriminatory conduct, and the change does not reduce the efficacy of a remedial order which had the effect of restoring to GSN the carriage rights it illegitimately lost and of deterring other MVPDs from engaging in anti-competitive and discriminatory practices going forward.[32]

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[29] *Id.*

[30] *See supra* note 4 (arguing Cablevision should have raised issue earlier).

[31] See GSN Reply to Exceptions, at 35-36 (explaining precedent rejecting First Amendment arguments in the program carriage context); GSN Reply FoF, at 64-66 (discussing courts rejecting similar types of First Amendment arguments under intermediate scrutiny standard).

The Commission has further recognized a substantial government interest in "promoting diversity and competition in the video programming market" largely "because MVPDs have an incentive to shield their affiliated programming vendors from competition." GSN Reply to Exceptions, at 36-37 (internal quotation marks omitted). *See also In re Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, 11517 (2011), *vacated in part on other grounds sub nom*, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013).

[32] *See* GSN Reply to Exceptions, at 35-39. Cablevision repeatedly insisted in its Exceptions that the remedy is impermissible because injunctive relief is "designed to deter, not punish." Cablevision Proposed Br., at 10 (citing Cablevision Exceptions, at 39-40). Yet GSN does not argue that the relief here is meant to punish—instead it is both meant to redress past harm to GSN and to serve as a deterrent to future harm. *See generally, Promoting the Availability of Diverse and Independent Sources of Video Programming*, 81 Fed. Reg. 73367-02 (proposed Oct. 25, 2016) (to be codified at 47 C.F.R. pt. 76) (discussing continued need to protect programmers from anti-competitive practices by MVPDs).

Altice was on notice of Cablevision's potential liability in this matter and accepted that liability by virtue of the merger.[33] Cablevision's proposed Response points to no new argument in GSN's Reply; GSN merely responded directly to Cablevision's erroneous invocation of its change of ownership as a basis for evading responsibility for remediation of its illegal behavior. Cablevision cannot claim surprise about the matters it seeks to address outside of the permitted pleading cycle and its effort to evade the limits of the rules is without factual or legal foundation.

CONCLUSION

For the reasons set forth above, the Commission should deny Cablevision's Motion for Acceptance of its Response in Further Support of its Exceptions to the Initial Decision.

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The risk of recurring harm is not hypothetical; during the pendency of Cablevision's motion to file its Response, Altice's founder announced the launch of a 24-hour news channel in the U.S., with Altice USA as the channel's first distribution partner. *See* Press Release, *i24 News to Launch 24/7 News Channel in the U.S.*, Digital Journal, available at http://www.digitaljournal.com/pr/3215999 (Jan. 27, 2017). Cablevision's suggestion in its proposed Response that "there is no risk of future harm" since Altice is not vertically integrated is thus belied by Altice's own business plans. *See* Cablevision Proposed Br., at 10.

[33] *See* GSN Reply to Exceptions, at 38-39 (explaining Altice's acceptance of liability).

CERTIFICATE OF SERVICE

I, Stephen Kiehl, hereby certify that on February 2, 2017, copies of the foregoing were served by electronic mail and hand and/or overnight delivery upon:

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